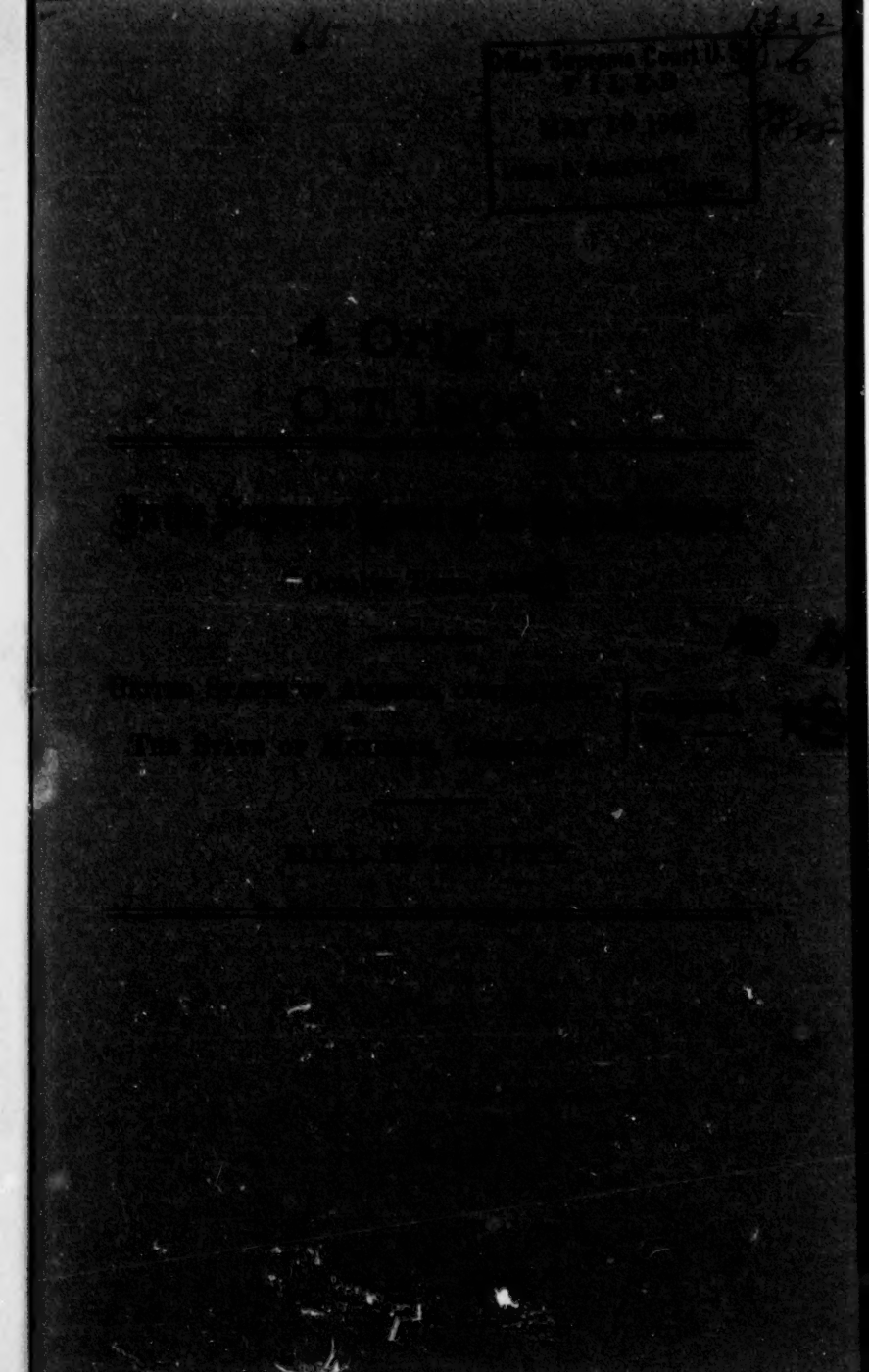

In the Supreme Court of the United States.

IN EQUITY. ORIGINAL, No. ——.

October Term, 1901.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in Equity:

Philander C. Knox, Attorney-General of the United States of America, for and in behalf of said United States, brings this bill of complaint against the State of Michigan, and thereupon your orator complains and says:

FIRST.

That the said State of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the St. Marys River, at or near St. Marys Falls, where Lake Superior empties into said river; and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able through the influence of its Senators and Representatives in Congress from said State, with the cooperation and influence of other States which might become directly affected in a desirable manner, to cause and procure said Congress to

pass a law, which became operative on the 26th day of August, 1852, appropriating to the State of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands known as the military reservation at the Falls at St. Marys River in said State, and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby, granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is hereby vested in said State forever for the purposes aforesaid and no other: *Provided*, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said Falls as, under the approval of the Secretary of War, may be selected: *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.
>
> SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in

constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry.

SEC. 3. *And be it further enacted*, That the said lands hereby granted shall be subject to the disposal of the legislature of said State for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

SEC. 5. *And be it further enacted*, That the legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs, and operating of said canal and of the earnings

thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs, and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge, and repairs of the same.

SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

Approved, August 26, 1852.

And your orator further shows that the legislature of the State of Michigan afterwards passed an act providing for the construction of a ship canal around the Falls of St. Mary, the same being number thirty-eight of the session laws of the State of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the State of Michigan. By its said act, also, the governor was authorized to appoint a board

of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating, and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor, and other matters connected with such work, such act being in terms as follows:

SECTION 1. *The people of the State of Michigan enact*, That the act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of St. Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

SEC. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate, to appoint five commissioners and an engineer, who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal; and said commissioners are authorized and empowered to make all necessary contracts for the

construction of the same; and during said construction, if at any time said commissioners shall be dissatisfied with the manner of construction or the materials used, it shall be competent for them, or a majority of them, to direct the contractor to construct the same in such other manner and to use such other materials as to such commissioners, or a majority of them, or engineer, shall seem necessary to insure a permanent and durable work; and this condition shall be embodied in any contract made for the construction of said canal. In case any controversy shall arise between the commissioners and contractor or contractors in regard to said materials, or the manner of doing said work, during the construction of said canal, the same shall be decided by a board, to consist of said engineer and the governor of this State, and the district judge of the upper peninsula, who shall decide thereon in a summary manner, and the decision of a majority of them shall be binding and conclusive upon the contractors, who shall thereupon proceed with the work, in the manner and make use therein of the material so required by said board or a majority of them: *Provided, however*, That the work upon said canal shall not be suspended or delayed by reason of said controversy, and the contractors shall proceed therewith as required by said commissioners. The locks in said canal shall not be less than three hundred and fifty feet long, and not less than seventy feet wide: *Provided*, That all appointments made by virtue of this act shall

cease and determine when said canal is completed.

SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof. Neither the commissioners, or governor, or the engineer, or any member of this legislature, or any person related to the commissioners or engineer, shall in any manner be interested in the contract, directly or indirectly, for the construction of said canal.

SEC. 4. No contract for the construction of said canal shall take effect until it shall have been approved by the governor and engineer.

SEC. 5. The contractor or contractors for the construction of said canal shall defray the entire cost of surveying, locating, and constructing the same, the necessary traveling and other expenses of the commissioners, the salary of the engineer and assistants. The necessary expenses of the commissioners shall be paid out of the State treasury, upon the warrant of the auditor-general. The engineer shall have power, with the approval of said commissioners, to employ such assistants as may be necessary and

proper. The assistants shall receive such reasonable compensation for their services as may be agreed upon by said commissioners, and the engineer and assistants shall be paid out of the State treasury from time to time, upon the account of each respectively being certified to be correct by said commissioners and upon the warrant of the auditor-general. The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the State treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the State land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list and to designate and mark upon the books and plats in his office the said lands as St. Mary canal lands.

Sec. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the governor and engineer, they shall cause a certificate thereof to be signed by the commissioners, governor, and engineer, and filed in the office of the commissioner of the State land office. Thereupon it shall be the

duty of the said commissioner of the State land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of state, and patents shall immediately be issued thereon, as in other cases.

SEC. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and, on or before the first Monday in October in each year, return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

SEC. 8. The said commissioners shall be subject to removal for cause by the governor; and if a vacancy shall occur, by removal or otherwise, when the legislature is not in session, the governor may fill such vacancy, and the person so appointed shall hold his office until the legislature meet.

SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice

to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

SEC. 10. That such contractor is by this act empowered and authorized to associate with himself in the obligations, agreements, and conditions of said contract such persons or parties as he may elect, and assign to them such proportional interest in the remunerations of lands, or the avails thereof, as he may decide and agree upon; or he may assign his rights, privileges, and remunerations under the contract with the State to any association organized according to the laws of this or any other State; and, upon due notice to the board of commissioners and governor, they shall be made parties to the obligations and emoluments of the contract, and be authorized upon such assignment and notice to hold and sell lands, and improve and use the same as they may see fit and desirable, to the same extent that the contractor might individually have done; but in no case shall himself or his sureties be eased or exempted from their full liabilities to forfeitures for nonfulfillment of the contract as before specified in failure or inadequacy of additional security offered by assignees: *Provided*, It shall not be lawful for said company to use their funds, or any part thereof, in any banking or brokerage or in buying or selling bank notes or bills of exchange, or in any other business whatever, except that

especially provided for by this act and the acts referred to herein.

SEC. 11. The said commissioners, in entering into the contract for the construction of said canal, shall provide that the railroad at present existing across the Portage be in no way unnecessarily interrupted during the progress of the work; and said commissioners shall have power to decide the necessity of any interruption; and the said commissioners may, at the expense of the said railroad company, relocate said railroad, if they shall deem it necessary to aid and promote the construction of said canal.

This act shall take effect immediately.

Approved, February 5, 1853.

SECOND.

Your orator shows that the lands so appropriated were duly selected and certified to the State of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the State of Michigan, and that at some time subsequent to such selection and certification said State of Michigan constructed, or caused to be constructed, and put into operation the canal and lock so appropriated for, but that the said State of Michigan did not report to the Secretary of the Interior, as required by the terms of section 5 of said act of Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs, and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows

that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memoranda indicating that any report or reports, such as were provided for in said section, were ever made, so that your orator is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control, and management of said canal, as in said act provided.

THIRD.

Your orator further shows that by an act of the legislature of the State of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the State of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated, and managed by the State of Michigan, and that during the entire management of the same by said State, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the State of Michigan were ever permanently invested or involved in such control, operation, and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was

managed, controlled, repaired, and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said State of Michigan was in such control thereof.

FOURTH.

And your orator further shows that he is informed and verily believes, and therefore charges the fact to be, that during such management and control by the State of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the State of Michigan belonging to the fund of said canal, not appropriated or the expenditure thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress originally providing for the construction of

said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision, and expenses of the management thereof.

And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements, and property of various kinds in connection with extensions, repairs, improvements, management, and control of said canal and lock by defendant, and at the time of the transfer to the United States as aforesaid the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the defendant in its capacity as the manager and controller thereof, but whether any further and larger sum of money than is hereinbefore stated was, should, or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does not know and has no means of being informed, and is therefore obliged to depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

FIFTH.

And your orator further shows that the State of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of

the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the State of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing States of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the State of Michigan and became operative on March 3, 1881. By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept on behalf of the United States from the State of Michigan the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in the 21st Stat. L., 189. And

thereupon said canal actually was transferred to the officers of the Government of the United States connected with the War Department thereof, and your orator shows, avers, and charges that no tools, implements, personal property, chattels, goods, moneys, or effects of any name or nature that were in the treasury of the State of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said State of Michigan, defendant herein, or might have been in such custody connected with or belonging to said canal or lock, its fund, its management and control, were so transferred and turned over.

SIXTH.

Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the State of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the Stateof Michigan, increasing its commerce, or extending its authority alone, but for the purpose of accomplishinga public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the State of Michigan in certain of its terms, it was provided that in case of the failure to construct said canal, the proceeds of the sale of such lands should be returned to the United States; also that the State of Michigan should have no beneficial interest

in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States Government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs, and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the State of Michigan and forwarded by the governor thereof to the Secretary of the Interior concerning the management, control, and sale of lands; and thus, instead of being an actual grant or donation of lands to the State of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act merely operated to create a trust in the State of Michigan for the purpose of carrying out a public work in which it, the State of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the State of Michigan hereinbefore quoted said donation or appropriation of lands was accepted subject to all limitations, restrictions, and conditions imposed by Congress as aforesaid. Your orator further shows that the State of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works, and its management and control of the latter as

a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the State of Michigan passed and approved February 14, 1859, the same being No. 175 of the session laws of the State of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

> Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this State thereto, etc.

And your orator further shows that the treasurer of the State of Michigan, who, by virtue of his office, was one of the members of the said board of control of the St. Marys Falls Ship Canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said State, made use of the following language:

> Since my last report, the remainder of the personal property belonging to the St. Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under act No. 17, laws 1881, the State acting simply as trustee.

But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney-general and the board of control of St. Marys Falls Ship Canal, denies such a trust, or its liability to the United States in the premises.

SEVENTH.

Your orator further shows and charges that it became and was the duty of the State of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock, and that instead of so performing its equitable duty in the premises, the said State of Michigan, the defendant herein, converted said funds to its own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said State, said joint resolution being No. 20, of the public acts of 1897, which in terms is as follows:

> Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into the fund or by the General Government;
>
> And whereas there now remains on hand, under the board of control of the St. Marys

Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

Therefore, resolved by the senate and house of representatives of the State of Michigan, That the auditor-general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

And be it further resolved, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.

Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the State of Michigan and all of the officers of said State directly concerned in any manner with the custody, management, or control of said fund or property, and particularly of the board of control of the St. Marys Ship Canal, which consists of the governor, auditor-general, and treasurer of the said State of Michigan; and also of the attorney-general of the State of Michigan, and that said reasonable and just request has been refused by them and each of them.

EIGHTH.

Your orator also shows and charges that it became and was the duty of the State of Michigan to report its doings in the premises to the Secretary of the Interior at least once in each year from the date it assumed the trust hereinbefore set forth, and to account to said complainant for all of its doings in regard to the sale of the lands so appropriated as before stated, as well as the building and construction of said canal and the collection of tolls and expenditures of money in connection with the care, supervision, management, and repair of said canal and lock, and the funds in its hands from time to time; and that it became and was its duty in equity to pay over all funds on hand or within its control in connection with its said trust, and to surrender and transfer to the complainant all property, goods, implements, and effects in its hands connected therewith at the time when the said canal was transferred and passed into the hands of the United States, and for want of performance of its just, reasonable, and equitable duties in such behalf and its failure to perform its said duties, the State of Michigan, trustee, and defendant in this suit, should be held to make just, true, certain, specific, and complete account of all its doings in and about the sale of the said lands so appropriated, the moneys, if any, received therefrom, the manner and extent to which the same were expended and for what purpose, and the balance, if any, arising from the disposition of said lands which remained, or still remain, or should be and remain within the treasury of

the said defendant; and also to fully account for its construction of the said canal and lock and the manner in which the same was performed, and the time when said work was fully completed; and also to account for all tolls collected from year to year in, by, under, and through its management and control of the said canal and lock, from the time when the same were put into operation to the present time, and also the collection of tolls from time to time and from year to year, and what was done with the said tolls, and by whom and for what purpose the same were expended, and also as to what tools or implements or property of any name and nature were from time to time purchased, used, held, and kept by said defendant under its control and management of the work aforesaid, and also what balance of money and what property were in its hands at the time of transfer of said canal to the complainant as hereinbefore stated, and what disposition has been made of the same.

Your orator therefore prays that the said defendant may set forth an account of all and singular the lands so appropriated by Congress and certified to defendant as aforesaid, and set forth and in detail show in what manner the same were disposed of and for what purpose, and particularly any portion of the proceeds arising from such sale or disposition of said lands so used by said defendant for any purpose whatever other than in the construction of said canal and lock, and the proper expenses connected therewith; and if so, what lands were so otherwise made use of, or the

proceeds thereof diverted by the said defendant, and the price and value of the same;

And also that the defendant may set forth a full, true, and just account of the moneys arising from the sale and disposition of said lands that were paid out and expended in and about the construction of the said canal and lock; to whom the same were paid, and in what manner and to what extent;

And also that the defendant may set forth a full, accurate, just, and true account and report of the manner in which said canal and lock were constructed, and the time or times at which said work, or portions thereof, was done and completed, and when the whole of the same was completed and put into operation;

And also that the said defendant may set forth and show, year by year, the rate fixed for tolls levied upon vessels for the use of said canal and lock, as well as the number of vessels using the same, their accurate tonnage, and the amount of money collected from them, and when and how and for what purpose the same was expended by the said defendant, and how much, if any, remained on hand at the close of each year's collection of tolls, and care, supervision, and maintenance of said canal and lock;

And that the said defendant may also set forth, year by year, an account of what tools, implements, machinery, or other property so purchased for use in the care, control, repair, and improvement of said canal, and what portion of the same remained on hand and undisposed of at the end of each year of such control

and management, and whether any of said property was sold or disposed of from time to time and sums of money received therefor, and for what purpose such sums of money were used;

And also that the said defendant may fully set forth an account, by list or schedule, of all and singular the tools, implements, machinery, or items of personal property of every name and nature belonging or in anywise appertaining to said canal and lock, with the inventoried value thereof in detail, in the possession or control of said defendant at the time said canal was transferred as aforesaid by the defendant to the United States;

And also that the said defendant may discover and set forth a full, true, and particular account of the money on hand and within the control of the board of control of said canal and lock, or any of the officers, employees, or agents of said defendant connected with the control and management of said canal and lock, or within the treasury of the said defendant, belonging to, connected with, or accredited to the said canal and its fund at the time of the said transfer by defendant to the United States;

And your orator further prays that after such accounting so prayed for as aforesaid, to be had under the direction and according to the rules of practice of this honorable court, the defendant may also, by the proper decree thereof, be required to turn over to the United States, through some proper officer thereof to be designated, all and singular the implements, tools,

machinery, and personal property of every name and nature which may remain in its hands; and if it shall be discovered upon such accounting that any part, parcel, or portion of said property has been disposed of by the said defendant since the transfer of the said canal and lock to the United States by the said defendant, that said defendant may be decreed to pay to the United States the full value of such property, together with interest thereon from the time or times when the same was so disposed of;

And also that said defendant, after such accounting to be had as aforesaid, may be decreed by this honorable court to pay over to the United States, through its proper officer to be designated by the court, all moneys which were or should have been on hand in its treasury or in the custody of any of its officers, employees, or agents connected with the building, repair, management, and control of said canal and lock until the time of such transfer, together with reasonable interest thereon, to be computed from time to time at such rate as this honorable court may by its order determine, and that your orator may have such other and further relief in the premises as shall be agreeable to equity and good conscience, and as may be found to be just and proper.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said State of Michigan, commanding it by a certain day and under a certain penalty therein to be inserted, to be

and appear before this honorable court in equity, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

P. C. KNOX,
Attorney-General of the United States.
JOHN K. RICHARDS,
Solicitor-General.
MARSDEN C. BURCH,
Solicitor, and of Counsel.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

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In the Supreme Court of the United States.

OCTOBER TERM, 1906

UNITED STATES OF AMERICA, complainant,
v.
THE STATE OF MICHIGAN, defendant.

Equity. Original. No. [illegible]

ON DEMURRER.

BRIEF FOR THE COMPLAINANT.

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STATEMENT.

The legislature of Michigan, by joint resolutions, having importuned Congress on several occasions for aid in the construction of a canal around the Falls of St. Mary, in the river of that name in said State, an act of Congress was passed, which became operative on August 26, 1852, appropriating 750,000 acres of land, to be afterwards selected, to construct a ship canal and lock for the purposes asked. This act, which is to be found in 10 Stat. L., beginning on page 35, provided for locating the canal through public lands known as

the military reservation at Sault Ste. Marie by appropriating 400 feet of land in width extending along the line of said canal, and vesting the title of said land in the State of Michigan for the purposes of said canal and no other, the details of the route to be approved by the Secretary of War. This canal was to be at least 100 feet in width, with a depth of 12 feet, and the lock was to be 250 feet long and 60 feet wide.

The second section of the act appropriated 750,000 acres of public land, thereafter to be selected by agents to be appointed by the governor of the State, subject to the approval of the Secretary of the Interior, the lands to be taken from any land belonging to the Government within the State of Michigan which were subject to private entry.

Section 3 provided that the lands granted should be subject to the disposal of the State legislature for such purposes and no other; that the canal should be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of the Government engaged in the public service, or upon vessels employed by the Government in transportation of property or troops of the United States.

Section 4 provided that if the canal should not be commenced within three and completed within ten years, the State should be bound to pay the United States the amount which might be received from the sale of any part of said lands by the State at not less than $1.25 per acre, the title of the purchasers under said State remaining valid.

Section 5 provided that the legislature should keep account of the sales of lands, and of all expenditures for construction, repair, and operation of said canal, and of its earnings, and should return such statement annually to the Secretary of the Interior; that whenever the State should be fully reimbursed for all advances made for the construction, repairs, and operating of said canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State should be allowed to tax for the use of said canal only such tolls as should be sufficient to pay all necessary expenses for the care, charge, and repairs of the same.

Section 6 provided that before the State should dispose of any of the lands selected the route of the canal should be established and plats filed in the office of the War Department and a duplicate thereof sent to the Commissioner of the General Land Office.

The legislature of Michigan, at its session in 1853, passed an act providing for the construction of the canal, accepting the appropriation with all conditions therein expressed attached, and made obligatory upon the State. The governor was authorized to appoint commissioners and an engineer to look after the construction of the canal and provisions were made for the construction of the same, the expenses attendant upon

such construction to be paid out of lands appropriated by Congress. The act also provided for the keeping of the accounts connected with the construction, turning out of the lands to the contractor and subcontractor, and other matters connected with the work.

The lands were appropriated and certified to the State, and the bill alleges that all of the lands were sold and disposed of in some manner by the State, and that the State constructed the canal, or caused it to be constructed and put into operation, but the State of Michigan did not report to the Secretary of the Interior as required by the fifth section of the act of Congress, relative to the accounts of sales and proceeds of the lands appropriated and the expenditures for construction, repairs, and operation of the canal. The canal and lock were wholly constructed from the appropriation of these lands.

The tolls were, from time to time, fixed and moneys collected in excess of the amounts actually used during the period of their collection, though without intention upon the part of the State to make a profit from the management and control of the canal in violation of the act of Congress, but in order to have cash on hand to make repairs during the season when the canal was closed to navigation, or at any time when needed. The funds thus collected from tolls gradually increased in amount with increasing commerce through the canal until finally, when the canal was turned back to the United States, there was in the treasury of the State belonging to the canal fund, not appropriated or the expenditure thereof in any way provided for, the

acknowledged sum of $68,927.12. This sum of money had been collected in good faith by the State for the purpose of devoting the same ultimately to the repair, improvement, supervision, and expenses of managing the canal.

A large amount of tools and implements had been purchased and collected by the State from time to time in connection with its extension, repair, improvements, management and control by the State, and when the canal was turned back to the United States much of this property was on hand, all belonging and appertaining to the canal and to the State in its capacity as manager and controller thereof. It is not known whether any further or larger sum of money than that above stated was within the control of the defendant, or in its treasury, because no reports, annual or otherwise, have been made to the Secretary of the Interior, as provided by the act of Congress.

On March 3, 1881, an act of the Michigan legislature became operative, turning the canal over to the United States. This act provided for the transfer to the United States by the State of all property belonging to said canal and all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance by the United States, in accordance with the act transferring the same. Congress passed an act approved June 14, 1880, found in 21 Stat. L., 189, providing that the Secretary of War should accept the canal on behalf of the United States, and appropriating $250,000 to

improve and operate it. Thereupon, the canal was transferred to the officers of the United States connected with the War Department, but no tools, implements, or property of any kind were transferred with it, nor were any moneys transferred or turned over.

In the preamble of the act of the legislature of Michigan approved February 14, 1859, it was recited that the canal was a trust created by the act of Congress and the assent of the State thereto. It is alleged in the bill of complaint that the State treasurer, in his report to the legislature, designated the State simply as a trustee in connection with the building and maintenance of the canal and the retention of the funds in the treasury.

The legislature of the State of Michigan, however, instead of paying over the money, by joint resolution in 1897 because the United States had not made demand for the money, provided that the money should be transferred to the general fund of the State and that the property should be sold and disposed of and the proceeds put in such general fund.

A demand was subsequently made upon the State of Michigan for the moneys in its hands connected with the canal and arising from the collection of tolls and sale of machinery, as well as for the machinery, which demand was refused by the officers of the State, including the governor and the State Board of Control of the canal.

The bill prays for an accounting as to the disposition of the lands, the management of the canal, control and sale of the property, and the payment of any

moneys found to be due the complainant, the turning over of any property still held by the State not disposed of, and general relief.

To this bill the defendant has filed a demurrer denying that the State was ever trustee of the Government and alleging that the same appears from the face of the bill itself, and denying that, under the statements contained in the bill, there is any ground for the relief prayed for, and alleging laches upon the part of the Government of the United States.

Argument.

The first four paragraphs of the demurrer mean practically one and the same thing, viz, that the State was not a trustee, but a donee subject to the one condition, namely, the free use of the canal by the Government. The other proposition, briefly stated, is that the Government has been guilty of laches.

The first and, as we believe, the only important consideration calls for a construction by this court of the act of Congress appropriating the land in connection with the previous resolutions of the legislature of Michigan requesting such appropriations, in connection with the act of the State legislature in accepting the appropriation and in constructing, operating, and finally returning the canal to the United States. Our leading proposition is that such construction will serve to show that the acts of both parties contemplated and constituted a mixed trust and power.

A mixed trust and power is where the settlor sketches the outlines of a trust and leaves the

> details to be settled and carried into effect, according to the best judgment of his trustee. The power joined to the trust in such case is imperative and must be exercised; but the mode of its execution is a matter of judgment and discretionary. (Perry on Trusts, par. 20.)

It is competent for a State to act as trustee. The lands appropriated as well as the right of way granted were both proper subjects for a trust. The purpose to be accomplished, namely, the construction of a canal to be operated for the public benefit, was a proper object to be obtained. The State was a proper party to take upon itself the construction and operation of the canal, as it was to accept the office of trustee for the sale of the public lands.

A careful analysis of the various acts quoted or cited in the bill of complaint will be instructive at the beginning of this argument. It is contended by the demurrer that there is no trusteeship upon the part of the State, and that is the main proposition here involved.

THE TRUST-CREATING ACT.

The act (which may be found in the printed bill of complaint, pages 2 et seq.) has a twofold purpose: first, the granting of an ~~assignment~~ easement or right of way through the public domain for the purpose of constructing the canal; second, the appropriation of lands and the disposal of the same, the construction of the canal, and its operation and maintenance. The first section of the act is devoted entirely to the first-named proposition. It is true that the term "granted" is repeatedly used

in this section, but it will also be observed that the property in such grant, while vested in the State forever, is for the "purposes aforesaid and no other." These last words, we insist, are express limitations upon the grant, and serve to show that it was the intention of the Government not to invest the State with unqualified ownership in the canal, but simply with the management and control of the same. The provisos in this section as to the location, line of survey, width and depth of the canal, as well as the dimensions of the lock, all serve to indicate that Congress intended that it should be constructed in a certain way under the approval of the Secretary of War and in a manner and with such dimensions as Congress did not see fit to leave open to dispute. It was as if Congress had intended to appoint an agent and to prescribe the manner in which the agent should perform the duties intrusted to him.

If the defendant should put special stress upon the terms "grant" or "granted," as used in this section, we contend that the same is not justified by the general provisions of this first section of the act. This court held long ago, in respect to a very similar act, that the word "grant" is not a technical word like "enfeoff," and we think the word, if used broadly and without limitation, would carry with it an estate in the thing granted, yet if used in the restricted sense, the grantee would take but a naked trust for the benefit of the grantor. This doctrine will be found very clearly stated in the decision of Mr. Justice Clifford, in *Rice* v.

Railroad Company (1 Black, 378). Construing the grant in that case, this language was used:

> Certain lands are granted to the territory by the first section to be held by it for a specific use and purpose, to wit, for the construction of a specific public improvement, to be exclusively applied to that purpose without any restriction except that the lands could be disposed of only as the work progressed. To carry out that purpose the lands were declared by the third section to be subject to the future disposal of the territorial legislature, but in no event should they inure to the benefit of any county not previously constituted or organized. Neither of these sections contain any words which necessarily absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly the words employed are sufficient to have that effect, and if not limited by the context or other parts of the act they would properly receive that construction, but the word "grant" is not a technical word like the word "enfeoff" and although if used broadly without limitation or restriction it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense and be so limited that the grantee will take but a naked trust or power to dispose of the thing granted and to apply the proceeds arising out of it to the use and benefit of the grantor. Whenever the words of a statute are ambiguous or the meaning doubtful the established rule of construction is that the intention must be deduced from the whole statute and every part of it.

Not only is this language applicable, but we believe that the whole case from which it is quoted is so far in line with this one as to make it a clear guide herein, if not absolutely decisive hereof.

The second section of this act appropriates the land for the completion of the canal, 750,000 acres in extent, and here again it is provided that the selection shall be by subdivisions according to the Government survey, and be made by State agents from any land in the State, and that the action of the State thus provided for shall be subject to the approval of the Secretary of the Interior.

The third section is further limiting in its character. While the land shall be subject to the disposal of the legislature of the State, it shall be "for the purposes aforesaid and no other." Again, the canal shall be and remain a public highway for the use of the Government, free from toll or charge on any vessel in the public service or in the transportation of Government property or troops.

Section 4 provides that the canal must be commenced within three years and completed within ten years or the money received from the sale of the lands must be paid back to the United States. This section alone serves to demonstrate almost beyond controversy the fact that the State was to have no beneficial interest in this canal or the lands appropriated therefor. Though the lands might be disposed of at once and good title vested by the State in the purchasers thereof, yet all the proceeds of the sales must be returned to the

United States if the canal should not be constructed within the time prescribed.

But section 5 is still stronger. If it was the intention of Congress that the State should own, or even have any beneficial interest in the canal or in the lands, the entire section 5 was without purpose or effect. The section applies both to the canal constructed and the lands granted to be sold for its construction, because it is expressly provided that the legislature must keep account of sales, proceeds, expenditures, construction, repairs, operations, and earnings, and all should be annually reported to the Secretary of the Interior. If this was a mere donation or grant and this act was intended to convey a beneficial interest to the State in the right of way and the lands to be sold, why should the Government make these provisions and continue its interest in the proceedings? But even with this part of the section evidence of the intention of Congress does not cease, for provision immediately follows, upon the supposition, doubtless, that the State might temporarily use some of its moneys in the construction of the canal in advance of receipts from the sale of lands; that when such advances shall be reimbursed to the State, or when the United States shall pay the State any balance of such advances over receipts from the lands and the canal, then the State shall be allowed to tax for its use tolls only sufficient to pay the necessary expenses for care, charge, and maintenance. What would be the purpose of reimbursing the State for that

which it might incidentally put into the project if the State was to own the canal or receive any special beneficial interest in that which is granted by the terms of this act? In whose interest would Congress require that tolls should be kept down to actual operating expenses? Plainly, we answer, in the interest of the public. What public? The people of the United States, acting through their representatives in Congress.

It was the intention of Congress, then, that this canal, while nominally in the hands of its agent or trustee, should really be not only the property of the United States, but be constructed for its benefit. True, the State of Michigan might be more directly interested for its people in the construction of the canal on account of its location and interests than other States, but the work nevertheless was a public one, for all classes and all sections, and only peculiar to Michigan because that State was intrusted with the construction and operation of the canal.

Section 6 of the act is also one of limitation and, as a safeguard, provides that no lands should be disposed of until the preliminary of filing plats of the route in the War Department or General Land Office should be taken.

Under the second section of the act, if the construction contended for by the defendant should prevail, all the other sections of this act, important as they are in character, might have been left out and must be treated as silent and dead in its consideration. This carries us back to the language used by Mr. Justice

Clifford in *Rice* v. *Railroad Company*, above quoted from. Quoting from where we left off, he says:

> The intention in such cases must govern when it can be discovered, but in the search for it the whole statute must be regarded and, if practicable, so expounded as to give effect to every part. That rule can not be applied to this case if it be admitted that the beneficial interest in the lands passed to the Territory, because it is expressly provided by the fourth section of the act that no title shall vest in the Territory of Minnesota, nor any patent issue for any part of the lands, until a continuous length of 20 miles of road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or as repugnant to the residue of the act, it is not possible, we think, to hold that the Territory acquired a vested interest in the lands at the date of the act.

THE TRUST-ACCEPTING ACT.

We come now to the acceptance of this trust by the State of Michigan. The text of that act is quoted in the bill of complaint, beginning on page 5. The first section accepts and agrees to all the conditions expressed in said act, and makes them obligatory upon the State. It may here be observed with propriety that the legislature does not accept sections 1 and 2 of the act of Congress, but includes all the conditions expressed in the other four sections, sacredly promising in the beginning to fulfill each and every one of them. Nothing could be more definite. Nor can anything be more expressive than the language contained in section

2 of the act of the legislature. "For the purposes of carrying out the objects of said act," is the language used. If the State of Michigan had expected or understood that it was about to commence the construction and obtain the ownership of a great work to its own use and benefit, why should the language "for the purposes of carrying out the objects of said act * * * in conformity with the provisions of said act of Congress" be used?

Again, in section 3 (p. 7, bill of complaint) this language is used relative to the responsibility of persons bidding for the contract to construct the canal:

> And his or their ability to carry into effect the object and intention of said act of Congress by constructing said canal in the best and most expeditious manner.

It seems to have been the plan of the State from the start to turn over the lands appropriated in payment for a completed canal. Such purpose is shown by the provisions of section 5, found on page 8 of the bill, that all preliminary expenses should be paid out of the State treasury, but as fast as the same is done the contractors who were to receive the lands must pay the State back again for these disbursements, thus saving the State, out of the lands appropriated, harmless from any except the most temporary investment of money in this project. Provision is also made in this section for making a report to the General Land Office of the United States.

Again, section 7 provides for an annual report by

the governor to the Secretary of the Interior, in accordance with the requirements of the act of Congress. We have thus covered such provisions of the act as seem pertinent to the question under consideration.

THE STATE'S SUBSEQUENT ATTITUDE.

The above act was passed and approved February 5, 1853. To show how the authorities of the State regarded this matter, as early as February 14, 1859, in a preamble to act No. 175 of the session laws of Michigan for that year, the following language is made use of and it is quoted in the bill of complaint:

> Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness and the due performance *of the trust created by said act of Congress* and the assent of this State thereto, etc. (Italics are ours.)

Later on, in the report of the treasurer of the State of Michigan, who was himself one of the board of control of the St. Marys Falls Ship Canal, for the year 1883, such report having been made to the governor and transmitted to the legislature as usual, the following language was used:

> Since my last report the remainder of the personal property belonging to the St. Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. The business appertaining to the management of the canal on the part of the State has ceased and

the moneys in the fund remaining in the State treasury under act No. 17, laws of 1881, the State acting simply as *trustee*.

We have thus reviewed the act of Congress in creating the trust, the act of the legislature of Michigan accepting the same, the subsequent act of the legislature defining it as a trust, the report of a member of its board of control even after it had been turned back to the Government showing, at least, the amount named as being in the treasury to the credit of the canal fund and designating it as a trust.

THE CONVERSION OF THE FUND.

Notwithstanding the attitude of the State as above shown, the State of Michigan never paid the money over, but at a later date, by joint resolution No. 20 of the public acts of 1897, proceeded to convert the fund to its own use by transferring it from the canal fund to the general fund, the language of the joint resolution being as follows:

> Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by persons who paid the same into the fund or by the General Government; and
>
> Whereas, there now remains on hand, under the board of control of the St. Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the

United States having been made for a transfer of said tools and machinery: Therefore,

Resolved by the senate and house of representatives of the State of Michigan, That the auditor-general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

And be it further resolved, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.

OTHER WRONGS.

But the recovery of this fund is not the only relief sought by the bill. It must be remembered that absolutely no account has ever been rendered by the State of Michigan to the complainant, as appears from the bill of complaint—

First, of the construction of the canal.

Second, the sale and disposition of the lands.

Third, the operating expenses of the canal.

Fourth, of the tolls collected by the State.

Fifth, of the repairs made by the State.

It seems to us, so far as the purposes of the demurrer are considered, that the complainant is entitled to a full and complete examination of these various requirements of the act of Congress irrespective of the balance converted to the State's general fund by the joint

resolution hereinbefore quoted. There is no method whereby such a report can be secured except by the order of the court in this proceeding. It is possible that mandamus might have been made use of from time to time to compel the State to do its bounden duty, but if our theory that the State is a trustee is correct, a court of equity would also at all times have jurisdiction to examine into the affairs of the trust, and equity would be a much more complete remedy than mandamus, for the reason that the State, even if it should make a report and such report indicated that the State had not in any of these particulars fulfilled its duty to complainant, some proceeding would then have been required to compel the State to make amends for its failure properly to perform its duties as trustee.

LACHES.

The doctrine that laches will not apply to a proceeding in equity instituted by the United States is so well settled that it would seem almost unnecessary to consider that question, which is raised in the fifth assignment of causes for demurrer. It was by the act of the State of Michigan itself, taking the initiative, that the trust was surrendered and the canal turned over to the Government of the United States. It then became the duty of the State to fulfill its trust and to fulfill the terms of its act transferring the property and belongings of the canal to the Government. The duty of a trustee to make an accounting when called upon is so plain that no argument should be required relating thereto. The bill shows that an accounting has

been asked for by the Department of Justice for and in behalf of the United States and that the authorities of the State have refused to make such accounting, as well as to pay over any funds which they may have in their hands. They now set up the doctrine of laches to save themselves the performance of that duty. A line of Federal cases may be cited and briefly quoted from upon this point.

In *United States* v. *Beebee* (127 U. S.) the following language is used, at page 338:

> The principle that the United States is not bound by any statute of limitations nor barred by any laches of its officers, however gross, in a suit brought by it as a sovereign government to enforce a public right or to assert a public interest is established past all controversy or doubt.

In *United States* v. *Dalles Military Road Co.* (140 U. S., 559) the same doctrine is asserted, and from the opinion written by Mr. Justice Blatchford, on page 632, we quote the following:

> Besides, the defense of stale claim and laches can not be set up against the Government—

citing a large number of cases decided by the Supreme Court.

In the case of *San Pedro and Canyon del Agua Co.* v. *United States* (146 U. S., 120) the following language was used by Mr. Justice Brewer:

> This last matter is also a sufficient answer to the second point made by the appellant, and that is that the prosecution of this suit is barred

by laches, for it is well settled that when the Government has a direct pecuniary interest in the subject-matter of the litigation the defenses of stale claim and laches can not be set up as a bar.

In *United States* v. *Insley* (130 U. S., 263) Mr. Justice Blatchford repeats the language practically adopted by this court in equity cases where the Government is a party. We think further citations or quotations are unnecessary, as no question seems to have been raised for a long period of years of the correctness of this well-settled principle.

MARSDEN C. BURCH,

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